

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

TRANSCIENCE CORPORATION &)	Civil Action No. 13 CV 6642
YOLANDA VON BRAUNHUT)	
(individual),)	
Plaintiffs,)	AFFIDAVIT OF JAMES P.
-against-)	O'ROURKE
)	
BIG TIME TOYS, LLC,)	
Defendant.)	

-----X

STATE OF TENNESSEE)
) ss:
COUNTY OF DAVIDSON)

I, James P. O'Rourke, being duly sworn, deposes and says:

1. I am an officer of defendant Big Time Toys, LLC.
("defendant" or "BTT").

2. I make this Affidavit based on personal knowledge.

The Sea-Monkeys Business

3. "Sea-Monkeys" are brine shrimp, hatched from eggs in a small aquarium tank, and sold as a toy/novelty item.

4. The Sea-Monkeys product (or "kit") contains two principal components; (i) a small plastic tank and related paraphernalia manufactured at defendant's direction in China; and (ii) a set of three "pouches" (each slightly larger than a sugar packet), one purporting to contain dormant "instant live

eggs", another - "water purifier", and the third - "growth food", which plaintiffs manufactured in the U.S. and sold to defendant.

5. The eggs can remain in a dormant state for many years. They "hatch" when put in contact with water.

6. Under the License Agreement and Purchase Agreement, pouches manufactured by plaintiffs are shipped from the U.S. to China, inserted into kits and shipped to various countries for sale.

7. BTT's principal U.S. customers for Sea-Monkeys are major mass retailers.

8. Since January 1, 2008 to date, BTT (to its knowledge) has been the only company marketing and selling Sea-Monkeys.

Force Majeure

9. The Sea-Monkeys business suffered a material disruption in Fall 2012. By certified letter, dated October 25, 2012, the United States Fish and Wildlife Service ("USFWS") notified defendant that certain of its shipments were in violation of United States statutes and regulations. (Exhibit A).

10. USFWS claimed that because the dormant eggs contained in the kits were a "living organism", they could not be imported into the U.S. without following special import/export rules. USFWS impounded shipments of Sea-Monkeys in Illinois that were destined to Walmart. Another shipment, destined to Toys-R-Us,

was impounded in Los Angeles. These shipments were returned to China.

11. These regulatory actions caused significant disruption and expense to defendant.

12. By email dated November 14, 2012, defendant notified plaintiffs of this disruption. (Exhibit B).

13. By email dated December 6, 2012, defendant advised plaintiffs that it would not be making a December 2012 payment. (Exhibit C).

14. When alerted to this problem, plaintiffs' representative George Atamian contacted plaintiffs' representative, Dr. D'Agostino (recipient of lab fees defendant pays), who reportedly replied, ". . . in 45 years of working with Sea-Monkey® related issues, [Dr. D'Agostino] has never had any contact from USFWS." (Exhibit B).

15. At that time, and for ensuing few months, defendant did not know whether it would be able to continue the Sea-Monkeys business at all.

16. Foreign regulatory agencies also banned the importation of the kits into certain European Union countries for the same reason asserted by USFWS. As a result, in about May 2012, defendant was required to return to China two containers of Sea-Monkeys products that were sitting in Italy.

17. To defendant's knowledge, the USFWS issues appear to have been resolved. Defendant remains precluded from shipping Sea-Monkeys into European Union countries, resulting in an estimated loss of about \$500,000 of annual sales.

18. During the course of the business disruption, defendant did not have sufficient cash flow to pay its accounts payable in a timely fashion.

BTT's Payments Have Exceeded \$5,000,000

19. Following the Fall 2012 disruption in the business, defendant reviewed the Purchase Agreement and License Agreement to determine its rights and responsibilities. As part of that review, defendant added up all payments made by it under the agreements.

20. Between May 1, 2009 and December 1, 2012, defendant paid; (i) plaintiffs \$3,014,190.43 in Minimum Royalties and \$2,015,746.96 for pouches, and (ii) Montauk Marine Laboratory (Dr. D'Agostino) \$87,750.00 in supplemental lab fees.

21. Defendant estimates that the cost to produce each pouch should be no more than approximately \$0.08.

22. Plaintiffs should earn a significant profit element from the sale of each pouch to defendant. Payments for pouches are part of the cost of acquiring the business in much the same way purchasing inventory can be part of a business asset

acquisition. Pouch purchases and supplemental laboratory fees count as part of the Initial Purchase Price.

23. As per the express words in the Purchase Agreement, all payments thereunder and under the License Agreement, meaning the Minimum Royalty, pouches and lab fees, are applied to the payment of the Purchase Price.

24. Because plaintiffs repudiated the agreements, and will not release legal titles to the Sea-Monkeys properties to defendant, BTT withheld payments to plaintiffs.


Granting Plaintiffs' Motion Will Harm The Business

25. Granting the injunctive relief requested by plaintiffs will shut down the entire Sea-Monkeys business. No one will be marketing and selling the product. Valuable shelf space in mass retailers will be lost, likely never to be reclaimed, resulting in a material adverse effect on the business.

Plaintiffs Must Post A Bond

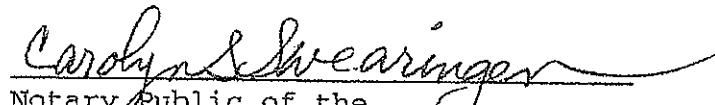
26. Defendant has more than \$5,000,000 invested in the Sea-Monkeys business as Initial Purchase Price. The \$5,000,000 of Additional Purchase Price is paid over time. Defendant asserts that, using the Purchase Agreement as a proxy, security in the amount of at least \$5,000,000 would be proper to pay the costs and damages sustained by it if it is found to have been wrongfully enjoined.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.


James P. O'Rourke

Dated: March 4, 2014

Sworn to and subscribed before
me this 4th day of March 2014.


Notary Public of the
State of Tennessee

My Commission Expires 05/05/15

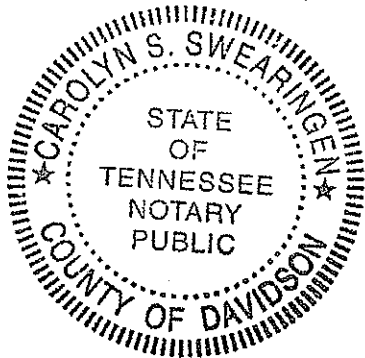


EXHIBIT A

USFWS 10/25/2012 LETTER



United States Department of the Interior
FISH AND WILDLIFE SERVICE
Office of Law Enforcement
10600 Higgins Road, Suite 200
Rosemont, IL 60018
847-298-3250



In Reply Refer To:
FWS/Region 3/LE

October 25, 2012

Certified Mail No. 7004 2890 0003 8765 3275
Return Receipt Requested

Big Time Toys, LLC
708 Berry Road
Nashville, TN 37204

Re: INV 2012305927

Dear Sir/Madam:

This letter serves as formal warning that the shipment of wildlife exported on 07/29/2012 via ocean cargo Container # MSKU0637458 Bill of Lading # HKG5505362 on OOCL Nagoya 32 and numerous previous exports were in violation of the following:

Declaration requirements for exportation [16 USC 1538(e); 50 CFR 14.63]. Import/Export without Necessary Declarations or Reports (Failure to Declare or Submit Reports): Failure to file wildlife export declaration as required. Importers or their agents must file with the Service a completed Declaration for Importation or Exportation of Fish or Wildlife (Form 3-177).

Fee requirement [16 USC 1538 (a)(1)(A); 50 CFR 14.94]. Designated port base inspection fees and Premium inspection fees. An import/export license holder must pay a base inspection fee for each wildlife shipment imported or exported at a designated port or a port acting as a designated port. An import/export license holder must pay a premium inspection fee for each wildlife shipment imported or exported containing live or protected species as defined in 14.94(h)(4).

Inspection requirements [16 USC 1538(d)(3); 50 CFR 14.51]. Service officers may detain for inspection and inspect any package, crate, or other container, including its contents, and all accompanying documents, upon importation or exportation.

Customs
Inspector Roth
2/13

Clearance requirements [16 USC 1538(d)(3); 50 CFR 14.52(c)]. A Service officer must clear all wildlife to be exported from the United States prior to the physical loading of the merchandise on a vehicle or aircraft, or the containerization or palletizing of such merchandise for export. To obtain clearance, the importer/exporter or the importer's or exporter's agent will make available to a Service officer all accompanying documents or wildlife.

Forty-eight (48) hour notice requirement [16 USC 1538(d)(3); 50 CFR 14.54(f)]. Exporters or their agents must notify the Service and make the shipment available for inspection at least 48 hours prior to the estimated time of exportation of any wildlife.

For a copy of the regulations, go to our website at www.fws.gov/wle. Please be advised that future violations may result in the seizure and forfeiture of the wildlife, monetary penalties, or both. All wildlife must be declared upon import and export from the US. If you have any questions you may contact Wildlife Inspector Laura DiPrizio at (847) 298-3250 ext. 16.

Sincerely,



Ryan Colburn
Supervisory Wildlife Inspector

Cc: File

EXHIBIT B

NOVEMBER 27, 2012 EMAIL STRING

Glossary of Parties Referred to in Emails:

<u>Name</u>	<u>Position</u>
Jamie O'Rourke	Officer of defendant Big Time Toys, LLC
Shane Brooks	Employee of defendant Big Time Toys, LLC
Sam Harwell	CEO/owner of defendant Big Time Toys, LLC
Ann Riley Caldwell	Counsel to defendant Big Time Toys, LLC
George C. Atamian	Representative of defendants Transcience Corporation and Yolanda von Braunhut
Dr. D'Agostino	Representative of defendants Tanscience Corporation and Yolanda von Braunhut

From: Jamie Orouke <jporourke@comcast.net>
Date: November 27, 2012 4:14:33 PM CST
To: George C Atamian <grog5@verizon.net>
Cc: Shane Brooks <shane.brooks@bigtimetoys.com>, Sam Harwell
<Sam.Harwell@bigtimetoys.com>
Subject: Re: Urgent Sea Monkeys Fish and Wildlife Issue

george,

Our problem w USFWS have only multiplied.

1. They forced Walmart to re export two shipments they were holding in Illinois and threatened them with criminal charges. Walmart is billing us for all related expenses and they have no replenishment.
2. Illinois contacted USFWS in LA and notified them to not clear our shipments which were due in last week and this week. We have spent literally hours on the phone with Illinois USFWS begging them not to require WalMart to return these shipments. They threatened us with criminal charges too. This is a very ticklish situation so please talk to me before you attempt to talk to USFWS.
3. We have at least two TRU shipments and one of ours being held in LA.
4. Our calls to the Supervisor there have not been returned. At this we have about 15 shipments on the water and no basis for even hoping they will be cleared.
5. This is catastrophic for Seam Monkeys.
6. We had Graphic ship out what they had available and USFWS required we send it through a particular port and be held there so they can inspect it before it goes out.
7. Like Italy, the USFWS have absolutely determined that the Sea Monkeys are live organisms and furthermore come under their control.
8. The only long term solution to this situation to insure that Sea Monkeys are a viable product is to make them completely in China including the eggs and food. Please work with Yolanda in the next few days to determine what her honest net profit is on the pouches we buy from her. I propose that if the number is reasonable that Sam Pay her that for every pouch we ship from China in addition to the royalties.

It is my hope that we can work through this decently and in order. We have too much invested for us to watch this go down the drain to individuals preferences or secret formulas. If necessary I am prepared to propose to BTT to source the pouches in China using standard Artemia eggs and food which are plentiful and sort the rest out with you all later. We cannot sit on our hands and watch Sea Monkeys die along with our multi million dollar investment.

Please get back to me ASAP

thanks,

Jamie

J. P. O'Rourke
jporourke@comcast.net
Cell 615-202-1900

On Nov 15, 2012, at 9:36 AM, George C Atamian wrote:

Dear Folks: I spoke with Dr. D'Agostino about the issue you are facing with USFWS. He told me that in 45 years of working with Sea-Monkey® related issues, he has never had any contact from USFWS.

I called Ms DiPrizio at her IL office and left a message for her to call me back.

I will continue to try to contact her.

I share your concern about this issue and empathize with the potential disruption of getting product to your customers for Black Friday and Christmas sales.

Back to you at the earliest.

Adios, G

George C. Atamian
Transcience Corporation
President
PH: 909.985.0889
FX: 909.920.3143
grog5@verizon.net

From: Shane Brooks [<mailto:shane.brooks@bigtimetoys.com>]
Sent: Wednesday, November 14, 2012 12:46 PM
To: grog5@verizon.net
Cc: 'Jamie O'Rourke'
Subject: Urgent Sea Monkeys Fish and Wildlife Issue
Importance: High

Hi George,

Attached and below is the information Jamie requested I sent you relating to the USFWS issue we are facing.

Thanks
Shane

From: Shane Brooks [<mailto:shane.brooks@bigtimetoys.com>]
Sent: Tuesday, November 13, 2012 5:35 PM
To: 'Ann Riley Caldwell'
Cc: 'Jamie O'Rourke'
Subject: RE: Transcience - Fish and Wildlife Export License

Hi Ann-Riley,

Thanks for your quick response. Jamie has been in touch with you already and wanted to pass along all the information that I have for this issue we're facing.

The US Fish and Wildlife has held-up a couple Walmart shipments claiming that a Wildlife Export Declaration has never been filed by BTT or Transcience; thus the eggs/pouches can not be imported into the US. This Declaration is coming up as a requirement because the eggs are considered a living organism. The end result is that unless we provide proof that an Export Declaration was filed or convince them that the eggs are not a living organism, the product currently quarantined by USFWS, will be returned to China as well as shipments that are due to arrive within the next couple weeks.

Attached is the certified letter we received outlining the issue with US Fish and Wildlife in Rosemont, IL. I have been working with Inspector Jennifer Roth and her direct number is 847-298-3250 ext 13.

Thanks
Shane

From: Ann Riley Caldwell [mailto:annriley13@gmail.com]
Sent: Tuesday, November 13, 2012 4:39 PM
To: Shane Brooks
Subject: Re: Transcience - Fish and Wildlife Export License

No idea. I know BTT gets a license from that department every year. I have never had anything to do with it though. Sorry but out of my area of knowledge. Let me know if I need to get TSC involved in any way or ask them any questions -

Ann-Riley

On Tue, Nov 13, 2012 at 2:24 PM, Shane Brooks <shane.brooks@bigtimetoys.com> wrote:
Hi Ann-Riley,

We have a big issue where the US Fish and Wildlife has rejected the shipments of the Sea Monkeys product for Walmart because they are claiming that the eggs should have been declared to Fish and Wildlife at export of US.

Has Transcience ever declared to the US Fish and Wildlife Services that they were exporting these SM pouches (eggs)?

Shane Brooks
Director of Manufacturing & Engineering
Big Time Toys
Nashville, Tennessee
Tel: (615) 383-2888 ext. 212

--
Ann-Riley Caldwell
ARC Strategic Consulting LLC
718 Thompson Lane
Suite 108 #233
Nashville TN 37204
Phone: 615.405.4317
Fax: 615.523.2869

EXHIBIT C

DECEMBER 6, 2012 EMAIL STRING

From: Jamie O'Rourke <jporourke@comcast.net>
Date: December 6, 2012 9:35:41 PM CST
To: grog5 Atamian <grog5@verizon.net>
Cc: Sam Harwell <sam.harwell.9@facebook.com>, Anne Riley <annriley13@aol.com>
Subject: Sea Monkeys Problems

Ann please forward this from your email to George and Fax to Yolanda. George, please confirm receipt.

Yolanda and George,

Thanks you for your time today on the phone. this is the letter I said I would send to document what was said on the phone.

We sent you the below email on 11/27 regarding the problem we are now having importing and exporting Sea Monkeys. This situation, along with other factors beyond our control, have materially and adversely affected the Sea Monkeys business. Because of these developments, BTT does not anticipate making the December minimum royalty payment to TSC.

We have consulted with our attorney, Jeff Kramer regarding our rights and obligations given these developments. We are also continuing to analyze the determination that the US Fish and Wildlife Service and the European Union have made regarding the Sea Monkeys being live organisms and the regulations and prohibitions that go along with that. As of this writing, all of our shipments to the US are being held in customs, Walmart shipments are being returned to China at BTT's expense, three containers to Italy have been returned to China and BTT has no clearance for Sea Monkeys to be shipped there in the future.

We are ready to try to work with you to come up with a reasonable resolution. We are prepared to discuss returning the business to TSC or negotiating modifications to the current agreement. Time is of the essence and delays will be costly to everyone involved. Please contact Jamie O'Rourke directly as he will be handling this on behalf of BTT.

regards,

Jamie O'Rourke Sam Harwell

Sent from my iPhone
J P O'Rourke
Cell 615-202-1900

November 27, 2012

Jamie O'Rourke wrote:

george,

Our problem w USFWS have only multiplied.

1. They forced Walmart to re export two shipments they were holding in Illinois and threatened them with criminal charges. Walmart is billing us for all related expenses and they have no replenishment.
2. Illinois contacted USFWS in LA and notified them to not clear our shipments which were due in last week and this week. We have spent literally hours on the phone with Illinois USFWS begging them not to require WalMart to return these shipments. They threatened us with criminal charges too. This is a very ticklish situation so please talk to me before you attempt to talk to USFWS.
3. We have at least two TRU shipments and one of ours being held in LA.
4. Our calls to the Supervisor there have not been returned. At this time we have about 15 shipments on the water and no basis for even hoping they will be cleared.
5. This is catastrophic for Seam Monkeys.
6. We had Graphic ship out what they had available and USFWS required we send it through a particular port and be held there so they can inspect it before it goes out.
7. Like Italy, the USFWS have absolutely determined that the Sea Monkeys are live organisms and furthermore come under their control. At this time we have no basis for any hope of shipping Sea Monkeys to the EU since they have been determined to living organism and it is illegal to sell living organisms as toys in the EU.
8. The only long term solution to this situation to insure that Sea Monkeys are a viable product is to make them completely in China including the eggs and food. Please work with Yolanda in the next few days to determine what her honest net profit is on the pouches we buy from her. I propose that if the number is reasonable that Sam Pay her that for every pouch we ship from China in addition to the royalties.

It is my hope that we can work through this decently and in order. We have too much invested for us to watch this go down the drain to individuals preferences or secret formulas. If necessary I am prepared to propose to BTT to source the pouches in China using standard Artemia eggs and food which are plentiful and sort the rest out with you all later. We cannot sit on our hands and watch Sea Monkeys die along with our multi million dollar investment.

Please get back to me ASAP

thanks,

Jamie

J. P. O'Rourke
jporourke@comcast.net